A **INAS FAIQAH MOHD HELMI (A CHILD SUING THROUGH HER FATHER AND NEXT FRIEND; MOHD HELMI ABDUL AZIZ) v. KERAJAAN MALAYSIA & ORS**

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
B MD RAUS SHARIF PCA
ABDULL HAMID EMBONG FCJ
HASAN LAH FCJ
ABU SAMAH NORDIN FCJ
[CIVIL APPEAL NO: 01(f)-20-09-2014(B)]
C 20 JANUARY 2016

TORT: *Negligence – Medical negligence – Claim for damages – Infant suffered from quadriplegic spastic cerebral palsy from child birth and treatment at hospital – Assessment of future loss and damage – Standard of proof – Whether on a balance*
D *of probabilities – Whether trial judge placed strict proof or specific proof as basis for claim for future damage – Whether resulted in huge reduction in compensation – Whether sum awarded appropriate and justified*

TORT: *Damages – Negligence – Medical negligence – Infant suffered from quadriplegic spastic cerebral palsy from child birth and treatment at hospital – Claim*
E *for general, special and future damages – Whether quantum of damages awarded appropriate and justified*

The appellant was born at the Sungai Buloh Hospital which was owned and operated by the first respondent. The second and third respondents were
F obstetrics and gynaecology medical officer and consultant paediatrician respectively. The appellant claimed that the respondents were negligent in attending to the appellant's mother's pregnancy which led to the birth of the appellant and in the care and treatment given to the appellant following her birth. The appellant alleged that as a result of the negligence, the appellant now suffered from quadriplegic spastic cerebral palsy. Liability was agreed
G between the parties and trial proceeded at the High Court only on the issue of damages. At the end of trial, the High Court awarded a total sum of RM1,193,442.39 as damages. Dissatisfied with the quantum of damages awarded, the appellant appealed to the Court of Appeal. The Court of Appeal dismissed the appellant's appeal and affirmed the award of damages made by
H the High Court. The appellant, thus, applied to this court for leave to appeal against the decision of the Court of Appeal, on the question of law of whether the standard of proof for future damage is proof of a possible likelihood as decided by the Courts of Appeal of England and Canada in *Hawkins v. New Mendip Engineering Ltd* and *Schrump et al v. Koot et al Lexsee* respectively or
I on strict proof as decided by the trial judge and accepted by the Court of Appeal. The appellant argued that the trial judge had allowed only some items of damages, all of them in sums lower than what were awarded in other comparable cases and had rejected completely the claim regarding some

items. With regard to the claim for future loss and damage, the appellant argued that the trial judge had wrongly decided that the standard of proof for such claim was strict proof or specific proof. This, according to the appellant, had resulted in a huge reduction in compensation for future loss and damage. The respondents, however, submitted that the civil standard proof *ie* on a balance of probabilities, applied to both special and general damages. The general damages, which include present and future loss, could not be said to require a different standard of proof as provided under ss. 101 to 104 of the Evidence Act 1950. The respondents argued that the trial judge did not place a strict proof or specific proof as the basis for the appellant to prove her claim for future damage. In this regard, the trial judge had merely stated that the appellant had not proven her claims.

Held (allowing appeal in part)
Per Abdull Hamid Embong FCJ delivering the judgment of the court:

(1) It is trite that damages serve as compensation, not a reward, less still a punishment. In assessing damages, the courts should not be motivated by sympathy and award fair compensation based on cogent evidence. The court could not descend into a domain of speculation. The evaluation of evidence which form the basis of any risk of future damage, must still be undertaken. The trial judge could only evaluate such evidence based on the recognised balance of probability standard, but with a lower degree of certainty as to the occurrence of such loss or damage in the future. Such a lower degree to be attached is best termed by the word 'possibility', 'chance', 'risk', 'danger' or 'likelihood', but regardless of the words used and their semantics, they must also essentially be a substantial one and not speculative. (paras 20 & 24)

(2) While the plaintiff only needs to show that there is a reasonable chance of a loss or damage occurring in order for her to succeed in her claim for future loss or damage, the standard of proof required in proving such claim remains the same. The principles set out in *Schrump* and *Hawkins* merely outline the degree of certainty to be attached in relation to the assessment of the chance or likelihood that a loss or damage might reasonably happen in the future in a claim for future loss and damage. Such principles relate and should be understood in the context of the extent of the evidential value that the plaintiff needs to demonstrate in order to establish the claim for future loss or damage, which could be satisfied by the production of sufficient evidence from the expert or by some other cogent evidence. Thus, the appellant's contention regarding the applicable standard of proof as regards future loss and damage was mistaken. (para 17)

(3) In determining a claim for future medical treatment, be it at a private or at a public hospital, the question of reasonableness in making such a claim should always be the paramount consideration. The trial judge had considered the reasons advanced by the appellant in claiming for the cost for future medical treatment at the private hospital and was not persuaded to award the full costs of RM4,200 per year. The types of treatment sought by the appellant were available at the public hospital. Therefore, the award of one third of the amount claimed at RM1,033 per year was fair and reasonable. (paras 36 & 37)

(4) The awards made by the High Court as regards future damage and loss were upheld, save the following three items of claim (i) costs of care by parents and family members. If not for the imposing necessity to take care of the appellant, the appellant's mother would have a better opportunity to develop her career, thus, the award of RM500 per month would be a fair and reasonable amount; (ii) costs of training and education of caregiver. A proper training and education was necessary to be provided to the appellant's parents and carers so as to meet the needs of the appellant. Thus, this court allowed the appellant's claim and awarded the appellant RM2,000 per year for 20 years; and (iii) cost of the purchase, maintenance and modification of a disabled-friendly vehicle at the sum of RM488,000 with replacements for every seven years over a period of 24 years. The award made by the trial judge in allowing the claim at RM89,000 for a one-off purchase of the vehicle over a period of 20 years was inappropriate and unreasonable in view of the normal life span of a vehicle. Thus, this court allowed the claim at RM89,000 but with two purchases over a period of 20 years. (paras 41-60)

Bahasa Malaysia *Headnotes*

Perayu telah dilahirkan di Hospital Sungai Buloh yang dimiliki dan dikendalikan oleh responden pertama. Responden kedua dan ketiga masing-masing adalah pegawai perubatan obstetrik dan ginekologi dan pakar perunding pediatrik. Perayu mendakwa bahawa pihak responden cuai dalam menangani kehamilan ibu perayu yang membawa kepada kelahiran perayu dan dalam memberikan penjagaan dan rawatan kepada perayu selepas kelahirannya. Perayu mendakwa bahawa akibat kecuaian itu, perayu mengalami quadriplegic spastic cerebral palsy. Liabiliti telah dipersetujui di antara pihak-pihak yang terlibat dan perbicaraan diteruskan di Mahkamah Tinggi hanya atas isu ganti rugi. Pada akhir perbicaraan, Mahkamah Tinggi memberikan satu award berjumlah RM1,193,441.39 sebagai ganti rugi. Tidak puas hati dengan kuantum ganti rugi yang diberikan, perayu merayu ke Mahkamah Rayuan. Mahkamah Rayuan menolak rayuan perayu dan mengesahkan award ganti rugi yang diberikan oleh Mahkamah Tinggi. Perayu, oleh itu, memohon ke mahkamah ini untuk kebenaran merayu

terhadap keputusan Mahkamah Rayuan, atas persoalan undang-undang: "sama ada standard pembuktian untuk ganti rugi masa hadapan adalah pembuktian kebolehjadian seperti yang diputuskan oleh Mahkamah Rayuan di England dan Canada dalam *Hawkins v. New Mendip Engineering Ltd* dan *Schrump et al v. Koot et al Lexsee* masing-masing atau atas pembuktian kukuh seperti yang diputuskan oleh hakim bicara dan diterima oleh Mahkamah Rayuan. Perayu berhujah bahawa hakim bicara hanya telah membenarkan ganti rugi untuk beberapa item sahaja, dan kesemuanya dalam jumlah yang lebih rendah daripada apa yang telah diberikan dalam kes-kes lain yang setanding, dan telah menolak secara keseluruhannya tuntutan untuk beberapa item yang lain. Berkenaan tuntutan kehilangan dan ganti rugi masa hadapan, perayu berhujah bahawa hakim bicara secara khilaf telah memutuskan bahawa standard pembuktian untuk tuntutan tersebut adalah pembuktian kukuh atau pembuktian khusus. Ini, menurut perayu, telah mengakibatkan satu potongan yang amat besar untuk pampasan ganti rugi masa hadapan. Responden-responden pula berhujah bahawa pembuktian standard sivil iaitu atas satu imbangan kebarangkalian diguna pakai dalam kedua-dua ganti rugi khas dan am. Ganti rugi am, yang termasuk kerugian semasa dan masa hadapan, tidak memerlukan standard pembuktian yang berlainan seperti yang diperuntukkan di bawah ss. 101 ke 104 Akta Keterangan 1950. Responden-responden menghujahkan bahawa hakim bicara tidak meletakkan pembuktian kukuh atau pembuktian khusus sebagai dasar untuk perayu membuktikan tuntutan ganti rugi masa hadapan. Dalam hal ini, hakim bicara hanya menyatakan bahawa perayu gagal membuktikan tuntutannya.

Diputuskan (membenarkan sebahagian rayuan)
Oleh Abdull Hamid Embong HMP menyampaikan penghakiman mahkamah:

(1) Adalah undang-undang matan bahawa ganti rugi bertindak sebagai pampasan, bukan ganjaran dan hukuman. Dalam mentaksirkan ganti rugi, mahkamah tidak patut didorong oleh simpati dan memberikan award pampasan yang adil berdasarkan bukti yang kukuh. Mahkamah tidak boleh mengamalkan spekulasi. Penilaian keterangan yang membentukkan dasar risiko kerugian masa hadapan harus dilaksanakan. Hakim bicara hanya boleh menilaikan keterangan sedemikian berasaskan standard imbangan kebarangkalian yang telah diiktirafkan, tetapi dengan satu tahap ketentuan lebih rendah berkenaan kejadian kehilangan atau kerugian masa hadapan. Tahap lebih rendah yang dipakai itu adalah sesuai diistilahkan dengan perkataan 'possibility', 'chance', 'risk', 'danger' atau 'likelihood', tetapi, walau apa pun perkataan-perkataan yang digunakan dan semantiknya, mereka mestilah pada dasarnya bersifat substantif dan bukan spekulatif.

(2) Walaupun plaintif hanya perlu menunjukkan terdapat kemungkinan berlakunya kerugian atau kehilangan bagi membolehkan dia berjaya dalam tuntutannya untuk ganti rugi masa hadapan, standard pembuktian yang diperlukan tetap sama. Prinsip-prinsip yang disediakan dalam *Schrump* dan *Hawkins* hanya menggariskan tahap kepastian yang perlu ada berhubungan dengan pentaksiran kemungkinan atau kebolehjadian bahawa kehilangan atau kerugian akan berlaku dalam tuntutan ganti rugi masa hadapan. Prinsip-prinsip itu berhubungan dan harus difahami dalam konteks mengenai tahap nilai keterangan yang perlu ditunjukkan oleh perayu dalam usaha untuk membuktikan tuntutan ganti rugi masa hadapan, yang boleh dibuktikan dengan mengemukakan keterangan yang berkaitan dan mencukupi dari seorang pakar atau melalui keterangan kukuh yang lain. Oleh itu, hujahan perayu berhubungan dengan standard pembuktian yang diguna pakai berkenaan ganti rugi masa hadapan adalah salah.

(3) Dalam menentukan tuntutan untuk rawatan perubatan masa hadapan, sama ada di hospital swasta atau awam, persoalan kewajaran dalam membuat apa-apa tuntutan perlu menjadi pertimbangan utama. Hakim bicara telah mempertimbangkan alasan-alasan yang dikemukakan oleh perayu dalam menuntut kos untuk rawatan perubatan akan datang di hospital swasta dan beliau tidak yakin untuk memberikan award penuh RM4,200 setahun. Jenis rawatan diperlukan oleh perayu adalah disediakan di hospital awam. Oleh itu, satu pertiga daripada jumlah yang dituntut iaitu RM1,033 setahun adalah adil dan munasabah.

(4) Award-award yang diberikan oleh Mahkamah Tinggi berkenaan ganti rugi masa hadapan dipertahankan, kecuali tiga item berikut yang dituntut iaitu (i) kos penjagaan oleh ibu bapa dan ahli keluarga. Jika bukan untuk keperluan menjaga perayu, ibu perayu akan mendapatkan peluang yang lebih baik untuk membangunkan kerjayanya. Oleh itu, award RM500 sebulan adalah jumlah yang adil dan munasabah; (ii) kos latihan dan pendidikan kepada penjaga. Latihan dan pendidikan yang betul perlu disediakan kepada ibu bapa dan penjaga perayu supaya dapat memenuhi keperluan perayu, oleh itu, mahkamah ini membenarkan tuntutan perayu untuk kos tersebut dan mengawardkan perayu RM2,000 setahun untuk 20 tahun; dan (iii) kos untuk pembelian, penyenggaraan dan pengubahsuaian sebuah kenderaan untuk yang kurang upaya pada jumlah RM488,000 dengan penggantian untuk setiap tujuh tahun dalam tempoh 24 tahun. Award yang diberikan oleh hakim bicara dalam membenarkan tuntutan pada jumlah RM89,000 pembelian kenderaan secara 'one off' dalam tempoh 20 tahun adalah tidak sesuai dan tidak munasabah memandangkan jangka hayat yang normal bagi sebuah kenderaan. Oleh itu, mahkamah membenarkan tuntutan RM89,000 tetapi dengan dua pembelian dalam tempoh 20 tahun.

Case(s) referred to:

Chai Yee Chong v. Lew Thai [2004] 2 CLJ 321 CA ***(dist)***
Gleneagles Hospital (KL) Sdn Bhd v. Chung Chu Yin & Ors And Another Appeal [2013] 8 CLJ 449 CA ***(refd)***
Hariesh Kumar Muthragi lwn. Kerajaan Malaysia & Yang Lain [2011] 1 LNS 1058 HC ***(refd)***
Hawkins v. New Mendip Engineering Ltd [1966] 3 All ER 228 ***(foll)***
Kerajaan Malaysia v. A'aliyah Syahril Riza (Civil Appeal No. W-01-425-10-2012) (Unreported) ***(refd)***
Kovats et al v. Ogilvie et al [1971] 1 WWR 561 ***(foll)***
Lim Poh Choo v. Camden and Islington Area Health Authority [1979] 2 All ER 910 ***(refd)***
Mayathevan Mayandi & Ors v. Dr Navin Kumar Batumalai & Ors [2016] 1 CLJ 115 HC ***(refd)***
Miller v. Minister of Pensions [1947] 2 All ER 372 ***(refd)***
Nurul Husna Muhammad Hafiz & Anor v. Kerajaan Malaysia & Ors [2015] 1 CLJ 825 HC ***(refd)***
Ong Ah Long v. Dr S Underwood [1983] 2 CLJ 198; [1983] CLJ (Rep) 300 FC ***(refd)***
Raja Zam Zam v. Vaithiyanathan [1965] 1 LNS 145 HC ***(refd)***
Schrump et al v. Koot et al [1977] 82 D.L.R. (3d) 553 ***(foll)***
Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***
Tan Cheong Poh & Anor v. Teow Ah Keow [1996] 3 CLJ 665 CA ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 3, 101, 102, 103, 104

For the appellant - PS Ranjan (MS Dhillon & KB Karthi with him); M/s PS Ranjan & Co
For the respondents - Nik Mohd Noor Nik Kar, SFC (Nurhafizza Azizan, SFC & Norazalina Razali, FC with him); AG's Chamber

[Editor's note: For the Court of Appeal judgment, please see Inas Faiqah Mohd Helmi v. Kerajaan Malaysia & Ors [2015] 3 CLJ 153 (overruled in part).] [In view of what has been discussed in the abovementioned judgment, the case of Chai Yee Chong v. Lew Thai is not relevant as regards the assessment of future loss and damage.]

Reported by Suhainah Wahiduddin

JUDGMENT

Abdull Hamid Embong FCJ:

[1] The appellant was born on 14 May 2007 at Sungai Buloh Hospital, which is owned and operated by the first respondent. The second and third respondents are obstetrics and gynaecology medical officer and consultant paediatrician respectively, who were alleged to have been negligent in the delivery of the appellant and in the proper attending of the appellant and her mother before, during and after the appellant's birth.

[2] The appellant, who was suing through her father as her next friend, claimed negligence on the part of the respondents in attending to the appellant's mother's pregnancy which led to the birth of the appellant and in the care and treatment given to the appellant following her birth. The appellant alleged that as a result of the negligence, the appellant was severely and irreversibly brain damaged and has now suffered from Quadriplegic Spastic Cerebral Palsy.

[3] On the date this matter was set for trial at the High Court, liability was agreed between the parties and the trial proceeded only on the issue of damages. At the end of the trial, the learned High Court Judge awarded a total sum of RM1,193,442.39 as damages together with interest and costs.

[4] Being dissatisfied with the quantum of damages awarded by the High Court, the appellant lodged an appeal to the Court of Appeal. On 24 February 2014, the Court of Appeal dismissed the appellant's appeal and affirmed the award of damages made by the High Court.

The Question

[5] The appellant applied to this court for leave to appeal against the decision of the Court of Appeal, which was granted on 18 August 2014 on the following sole question of law:

> Whether the standard of proof for future damage is proof of a possible likelihood as decided by the Courts of Appeal of England and Canada in *Hawkins v. New Mendip Engineering Ltd* [1966] 3 All ER 228, CA and *Schrump et al v. Koot et al Lexsee* 18 O.R (2D) 337 respectively or on strict proof as decided by the learned trial Judge and accepted by the Court of Appeal?

The Submissions

[6] The appellant argued that the learned trial judge had allowed only some items of damages, all of them in sums lower than what were awarded in other comparable cases and rejected completely the claim regarding some other items, even though such items had been allowed in other like cases, including in the Court of Appeal.

[7] With regard to the claim for future loss and damage, it was argued for the appellant that the learned trial judge had wrongly decided that the standard of proof for such claims was strict proof or specific proof. This, according to the appellant, had resulted in the failure on the part of the learned trial judge to give a proper regard on the evidence available before her and further, resulted in a huge reduction in compensation for future loss and damage in the present case.

[8] It was contended by the appellant that the correct standard of proof as regards future damage is as that stated in *Schrump et al v. Koot et al* [1977] 82 D.L.R. (3d) 553 and *Hawkins v. New Mendip Engineering Ltd* [1966] 3 All ER 228, CA. It was argued that in *Schrump*, the court held that the standard of proof was "that there is a reasonable chance of such loss or damage occurring". It was further submitted that a similar approach was also used in *Hawkins* whereby the court used words and phrases such as "a real and substantial possibility or risk", "likely future possibilities", "possibilities that might occur" and other similar terms to denote the possible occurrence of future uncertain events as regards the standard of proof required in a claim for future damage.

[9] Apart from *Schrump* and *Hawkins*, the appellant also cited the cases of *Lim Poh Choo v. Camden and Islington Area Health Authority* [1979] 2 All ER 910 and *Nurul Husna Muhammad Hafiz & Anor v. Kerajaan Malaysia & Ors* [2015] 1 CLJ 825. It was argued that all these authorities relied heavily on the opinions of experts and their knowledge of relevant facts as regards the future needs of the victims of torts. According to the appellant, their evidence was not to be weighed according to a standard of scientific proof, strict proof, specific proof or even the balance of probabilities. In this regard, it was also contended that s. 3 of the Evidence Act 1950 regarding proof of a fact which exists or regarding a fact which does not yet exist cannot apply to the future.

[10] Learned Senior Federal Counsel for the respondents argued that the civil standard of proof ie, on a balance of probabilities applies to both special and general damages. The general damages, which include present and future loss, cannot be said to require a different standard of proof as provided under ss. 101 to 104 of the Evidence Act 1950.

[11] It was further contended that in cases involving claims for future damage where the evidence of experts are mostly sought, as in the present case, it cannot be said that the plaintiff is exempted from proving his or her claim from the usual standard of proof, that is on the balance of probabilities. In order to succeed, the relevant expert witness must successfully prove that on the balance of probabilities, the proposed claim for future damage is probable to arise in the future. It follows that the evidence must come from a specialist who is an expert in his field, relevant to the claim.

[12] Learned Senior Federal Counsel argued further that in the present case, the learned trial judge did not place a strict proof or specific proof as the basis for the appellant to prove her claim for future damage. In this regard, the learned trial judge merely stated in her judgment that the appellant had not proven her claims in order for the claims to be allowed.

Standard Of Proof

[13] The standard of proof in civil cases is the legal standard to which a party is required to prove its case, namely on a balance of probabilities. In civil litigation, the question of the probability or improbability of an action occurring is an important consideration to be taken into account in deciding whether that particular event had actually taken place or not. In the case of *Miller v. Minister of Pensions* [1947] 2 All ER 372, Lord Denning said the following about the standard of proof in civil cases:

> The ... [standard of proof] ... is well settled. It must carry a reasonable degree of probability ... if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.

[14] With regard to the required proof in the assessment for future damage, the Court of Appeal in *Schrump* had this to say:

> In this area of the law relating to the assessment of damages for physical injury, one must appreciate that though it may be necessary for a plaintiff to prove, on the balance of probabilities, that the tortious act or omission was the effective cause of the harm suffered, it is not necessary for him to prove, on the balance of probabilities, that future loss or damage will occur, but only that there is a reasonable chance of such loss or damage occurring ...
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> ... Speculative and fanciful possibilities unsupported by expert or other cogent evidence can be removed from the consideration of the trier of fact and should be ignored, whereas substantial possibilities based on such expert or cogent evidence must be considered in the assessment of damages for personal injuries in civil litigation. This principle applies regardless of the percentage of possibility, as long as it is a substantial one, and regardless of whether the possibility is favourable or unfavourable. Thus, future contingencies which are less than probable are regarded as factors to be considered, provided they are shown to be substantial and not speculative: they may tend to increase or reduce the award in a proper case.

[15] On this point, the court in *Schrump* also referred to the judgment in *Kovats et al v. Ogilvie et al* [1971] 1 WWR 561 and cited with approval the following passage in the said judgment regarding the assessment of damages for future loss and damage:

> In assessing damages for personal injuries the award may cover not only all injuries actually suffered and disabilities proved as of the date of trial, but also the "risk" or "likelihood" of future developments attributable to such injuries. It is not the law that a plaintiff must prove on a balance of probabilities the probability of future damage; he may be compensated if he proves in accordance with the degree of proof required in civil matters that there is a possibility or a danger of some adverse future development.

[16] In referring to *Hawkins*, learned counsel for the appellant contended that the approach which was adopted by the court in that case is in agreement with the principles enunciated in *Schrump* as regards the proper standard of proof applicable in cases involving claims for future loss and damage.

[17] Having perused the authorities advanced by learned counsel for the appellant, we are of the view that the appellant's contention regarding the applicable standard of proof as regards future loss and damage was mistaken. We say so because while it is true that a plaintiff needs only to show that there is a reasonable chance of a loss or damage occurring in order for him to succeed in his or her claim for future loss or damage, the standard of proof required in proving such a claim remains the same, that is on the balance of

probabilities. In our understanding, the principles set out in *Schrump* and *Hawkins* merely outline the degree of certainty to be attached in relation to the assessment of the chance or likelihood that a loss or damage might reasonably happen in the future in a claim for future loss and damage. In our view, such principles relate and should be understood in the context of the extent of the evidential value that the plaintiff needs to demonstrate in order to establish the claim for future loss or damage, which can be satisfied by the production of the related and sufficient evidence from the expert or by some other cogent evidence.

[18] In this regard, we found that the following passage from the judgment in *Kovats* to be useful in discussing the applicable standard of proof with regard to the assessment of future damage:

> ... It is a fundamental rule that in civil cases questions of fact are to be decided on a balance of probabilities; this is a matter of proof. But it is not equally true that damages in respect of things which have not yet developed may only be awarded if it is probable that they will develop and may not be awarded if it is only possible that they will develop. *One can decide on a balance of probabilities that something in the future is a possibility, and in appropriate circumstances that possibility can be taken into account in assessing damages*; in such a case *it is not essential, before damages can be assessed for the thing, to decide on a balance of probabilities that the thing in future is a probability* ... (emphasis added)

[19] In addition, the court in *Kovats* also observed that there is an inclination for contradiction when the word "probability" is used as opposed to the word "possibility" as the basis in deciding on the balance of probabilities as to the happening of something in the future and instead suggested using the word "risk", "danger" or "likelihood" to avoid such a confusion. The relevant passage of the judgment is as follows:

> ... When the word "probability" is used in such a context there is an inclination to contrast it with the word "possibility". That can be avoided by using instead the word "risk", or perhaps "danger" or "likelihood". Then one can say, without the danger of being misunderstood, that *one can decide on a balance of probabilities that there is a risk of something happening in the future* ... (emphasis added)

[20] It is trite that damages serve as compensation, not a reward, less still a punishment (see *Ong Ah Long v. Dr S Underwood* [1983] 2 CLJ 198; [1983] CLJ (Rep) 300; [1983] 2 MLJ 324). In assessing damages, the court should not be motivated by sympathy and award fair compensation based on cogent evidence. The court should not descend into a domain of speculation. The evaluation of those evidence, which form the basis of any risk of future damage, must therefore still be undertaken. And the trial judge can only evaluate such evidence based on the recognised balance of probabilities standard. As was stated in *Schrump*:

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> Thus, future contingencies which are less than probable are regarded as factors to be considered, **provided they are shown to be substantial and not speculative**. (emphasis added)

The qualification as underscored in that sentence is in our considered view, necessary to be proven on a balance of probabilities.

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[21] The British Columbia Court of Appeal in *Kovats* as per the passage we reproduced above, as regards future possibility, had stated that "one can decide on a balance of probabilities that something in the future is a possibility ...", meaning that even the risk of a future damage happening needs to be proven on a balance of probabilities.

C

[22] The civil standard of a balance of probabilities is in accord with the requirement for proof under our Evidence Act 1950 where the word "proved" is interpreted in the following manner:

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> Section 3 – "proved": a fact is said to be "proved" when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

[23] This civil standard of proof is emphasised in the recent decision of this court in *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584; (02(f)-72-10/2013(A), 10 August 2015), a case concerning the standard of proof for fraud in civil claims, where it was held that:

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> At law there are only two standards of proof, namely beyond reasonable doubt for criminal cases while it is on a balance of probabilities for civil cases. As such even if fraud is the subject in a civil claim, the standard of proof is on a balance of probabilities. There is no third standard.

[24] With the above proposition, we are of the view that the standard of proof with regard to the assessment of future loss or damage is on the balance of probabilities, but with a lower degree of certainty as to the occurrence of such loss or damage in the future. From the authorities, one can say that such a lower degree to be attached is best termed by the word "possibility", "chance", "risk", "danger" or "likelihood", but regardless of the words used and their semantics, they must also essentially be a substantial one and not speculative, and that the standard of proving such "possibility", "chance", "risk", "danger" or "likelihood" of the future damage is still, in our opinion, on a balance of probabilities.

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[25] Most importantly, we have also carefully scrutinised the judgment of the learned trial judge. It is settled law that an appellate court will not interfere on a question of quantum awarded by the trial court unless it constitutes a wholly erroneous estimate (see *Hawkins*). We found that there is nothing wrong with the standard of proof applied by the learned trial judge in considering and evaluating the evidence as regards the appellant's claim

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for future loss and damage in this case. It is true that the learned trial judge had stated in her judgment that the appellant's claim, "telah tidak dibuktikan oleh plaintif secara khusus ..." but this phrase should be read in the context of the discussion made by the learned trial judge therein when dealing with the appellant's claim for future medical care. In this respect, it is to be noted that the appellant sought for cost of future medical treatment at a private hospital. The main reason given by the appellant's father for not pursuing the treatment at the public hospital was because of the long wait he had to endure. The learned trial judge however felt that the reason given was not sufficient since the appellant's father had failed to prove the specific duration for which the appellant herself had to endure and how many times she herself experienced such a long wait before being given the necessary treatment at the public hospital. Further, the learned trial judge also found that there was no proof or evidence to support the appellant's version in this regard. What was in evidence was merely that the appellant's father chose not to go to a public hospital. The relevant passage of the learned trial judge's finding is reproduced as follows:

> ... Telah tidak dibuktikan oleh Plaintiff secara khusus jangkamasa yang dialami semasa ingin menerima rawatan dan berapa kalikah Plaintiff telah menerima rawatan di hospital kerajaan yang menyebabkan Plaintiff menunggu lama untuk sesuatu rawatan. Apa yang ada di hadapan Mahkamah ini, hanyalah keterangan yang mengatakan bapa Plaintiff sendiri yang memilih untuk tidak pergi ke hospital kerajaan dengan memberi alasan bahawa beliau terpaksa menunggu lama untuk menerima rawatan. Tiada bukti atau keterangan untuk menyokong versi beliau ...

[26] From the above passage of the judgment, we are of the view that the learned trial judge was merely dealing with the quality of the evidence of the appellant in supporting her claim and in doing so, we do not see how the learned trial judge can be said to have had applied an exceptionally high standard of specific proof or strict proof as contended by the appellant. "Tidak dibuktikan secara khusus" to us simply means that no proof was available, that is all.

[27] The learned trial judge in her judgment had also, a number of times, said "tidak dibuktikan" as regards certain items for future loss and damage. The learned trial judge had considered the evidence and gave reasons for her findings in relation to those claims. We also found nothing in the judgment to suggest that the learned trial judge had adopted a different approach with regard to the standard of proof to be applied in relation to the appellant's claims for future loss and damage, or that she had come to a wholly erroneous award on those damages.

The Awards

[28] We shall now deal with the awards made by the learned trial judge of the High Court, specifically as regards to the appellant's claims for future damage.

[29] For convenience, we reproduce in full the awards which have been made by the learned trial judge at the end of trial with regard to future general damages:

(i) Medical care and hospital treatment	RM20,660
(ii) Cost of physiotherapy, occupational therapy and speech therapy	RM134,400
(iii) Mechanical aids and appliances	RM136,000
(iv) Cost of carers	RM192,000
(v) Cost of care by parents and family members	RM72,000
(vi) Cost of training and education of caregiver	Not allowed
(vii) Costs of periodical care	Not allowed
(viii) Cost of the purchase, maintenance and modification of a disabled-friendly vehicle	RM89,000
(ix) Cost of renovation for disabled-friendly home	RM80,000
(x) Cost of special clothes, diapers, disposal diapers and creams	RM33,600
(xi) Cost of future surgery	RM25,000
(xii) Pain and suffering arising from future surgery	Not allowed
(xiii) Cost of special food and nutrition	Not allowed
(xiv) Cost of accommodation and living expenses after the appellant attaining the age of 18 years	Not allowed
(xv) Cost of special education and training	Not allowed
(xvi) Cost of holidays	Not allowed

[30] However, for the purpose of the present appeal, we shall confine and deliberate on the items claimed by the appellant with regard to future loss and damage as argued and raised in the appeal before the Court of Appeal, under the following heads.

Medical Care And Hospital Treatment

[31] The appellant sought for the cost of medical treatment at a private hospital and claimed for a sum of RM4,200 per year. The learned trial judge however allowed only one-third of the claim at RM1,033 per year after finding that the grounds advanced by the appellant were not sufficient to justify the appellant for full cost in opting for private medical treatment. The learned trial judge reasoned, *inter alia,* that the types of treatment sought by the appellant are available at the public hospital; that the appellant's father

who was a retired teacher would be able to obtain facilities provided by the public hospital; that the long wait was not a sufficient proof of non access; and the increasingly better medical services provided in the public hospital.

[32] The Court of Appeal affirmed the award made under this head of claim by the learned trial judge and held that the order of the learned trial judge was in line with the principle laid down in *Chai Yee Chong v. Lew Thai* [2004] 2 CLJ 321; [2004] 2 MLJ 465 and *Gleneagles Hospital (KL) Sdn Bhd v. Chung Chu Yin & Ors and Another Appeal* [2013] 8 CLJ 449; [2013] 4 MLJ 785.

[33] Learned counsel for the appellant submitted that the Court of Appeal was in error in saying that the learned trial judge had acted in line with the principle laid down in the above two cases in awarding only one-third of the appellant's claim for cost of future medical treatment, when in fact there is no such principle. It was contended that *Chai Yee Chong* concerned a claim for past private medical treatment and therefore is not relevant to the present case. Further, it was submitted that there were discussions in *Chai Yee Chong* of a practice of allowing only one-third of past private medical treatment expenses but that practice was not made a principle as understood by the Court of Appeal.

[34] The appellant argued that the Court of Appeal was also in error in this case in not following its earlier decision in *Gleneagles* as regards future private medical treatment whereby the full cost of future private medical treatment was allowed, subject to a reduction of 30%, after taking into account factors such as advance lump sum payment and the contingencies of life in the future. In contrast, the appellant argued that the Court of Appeal had in fact misunderstood its own earlier decision in *Gleneagles* when holding that the court had granted one-third of the amount claimed for future medical treatment in that case without considering the fact that 70% of the full future cost was allowed.

[35] Learned Senior Federal Counsel for the respondents argued that the application of 'one-third practice' as propounded in *Chai Yee Chong* is not limited to only the cost of private medical treatment which has been incurred, but such practice was followed by a number of cases including *Gleneagles*. It was submitted that evidence must be led at trial to address on the appellant's needs and in the absence of such evidence, the court should dismiss the claim altogether or award a sum not exceeding one-third of the amount claimed. In this case, it was argued that the appellant merely made an assumption of the cost of future medical treatment at the private hospital and as such the learned trial judge had correctly allowed only one-third of the amount claimed, which the learned judge felt was a reasonable amount.

[36] In this respect, we are in agreement with the contention of the appellant that the case of *Chai Yee Chong* is not relevant to the present case. We respectfully say that the Court of Appeal had erred in coming to its conclusion that the award made by the learned trial judge was in line with

A the current practice on the strength of the decision in *Chai Yee Chong*, which is a case concerning a claim for past private medical treatment. In determining a claim for future medical treatment, be it at a private, or at a public hospital, the question of reasonableness in making such a claim should always be the paramount consideration. The plaintiff not only needs to
B justify, for instance, why he chooses treatment at a private hospital over a public one, but he must also shows that the amount claimed for such treatment is reasonable. Of course this can be satisfied by the production of compelling evidence for that purpose. It is to be noted that in claiming for the cost of future damage in *Gleneagles*, evidence was led as to the cost of
C rehabilitation care of the first respondent and the costing was obtained from the private hospitals/centres.

[37] Nevertheless, in the present case, we found that the learned trial judge had considered the reasons advanced by the appellant in claiming for the cost for future medical treatment at the private hospital and was not persuaded
D to award the full cost claimed by the appellant. The learned trial judge had given her reasons for awarding only one-third of the amount claimed by the appellant. We affirm the award made by the learned trial judge in this respect, but on a different ground. We found that the amount awarded by the learned trial judge was fair and reasonable, and we do not find any
E justification to disturb the same.

Cost Of Carers

[38] Under this head of claim, the appellant claimed the cost for the services of two Muslim Filipino maids on the basis of RM27,000 per year at RM1,500 per month x 1 1/2 maids (with a half reduction for the second
F maid). The learned trial judge however awarded the cost for one Indonesian maid on the basis of RM9,600 per year at RM800 per month x 1 maid. The learned trial judge reasoned that there would be no necessity for two maids to care for the appellant based on her own assessment and by the appearance of the appellant in court. The learned trial judge found that the appellant only
G weighed 9kg at the age of six years and would not be active like a normal child and therefore would not pose any difficulty for care by a single maid. The learned trial judge also reasoned that the engagement of two maids might cause a logistical problem and that the service of an Indonesian maid would be more appropriate in terms of culture and communication.

H **[39]** The appellant argued that the award made by the learned trial judge in this regard was not consistent with the awards which have been made by the courts in cases such as *Raja Zam Zam v. Vaithiyanathan* [1965] 1 LNS 145; [1965] 2 MLJ 252; *Kerajaan Malaysia v. A'aliyah binti Syahril Riza*, Court of Appeal Civil Appeal No. W-01-425-10-2012 (Unreported); *Nurul Husna*
I *Muhammad Hafiz & Anor v. Kerajaan Malaysia & Ors* [2015] 1 CLJ 825; *Hariesh Kumar Muthragi lwn. Kerajaan Malaysia & Yang Lain* [2011] 1 LNS 1058; Johor Bahru High Court Civil Suit No. MT1-22-915-2006; and *Mayathevan*

Mayandi & Ors v. Dr Navin Kumar Batumalai & Ors [2016] 1 CLJ 115; Melaka High Court Suit No. 22-111-07-2011. It was argued that in these cases, the cost and expenses of engaging two maids (but usually with a reduction for the second one) had been allowed.

[40] We are of the view that the learned trial judge was correct on her analysis and we do not find any reason to disturb the award made by her in this regard.

Cost Of Care By Parents And Family Members

[41] The learned trial judge allowed RM300 per month, as compared to the amount claimed by the appellant at RM800 per month. The learned trial judge reasoned that the burden of taking care of the appellant would be lessened with the service of maid and that it is the responsibility of the appellant's parents to give a proper care to her regardless of whether the appellant was born normal or otherwise. The learned trial judge also opined that the award made under this claim should not be seen as enriching the appellant's parents.

[42] The award of the learned trial judge was affirmed by the Court of Appeal, but premised on the application of one-third practice propounded in the case of *Chai Yee Chong*. The appellant argued that the award of the learned trial judge was manifestly low and that the Court of Appeal, in affirming the said award, had misapplied the case of *Chai Yee Chong* to the present case. We agree. First, we would like to reiterate that *Chai Yee Chong*'s case is not applicable in this case. Secondly, we are of the view that the application of the one-third practice is totally inapplicable in the present case simply on the basis that parental care cannot be given by a substitute in a government or private hospital.

[43] The value of care provided to a disabled person by family members had been given recognition. In *Tan Cheong Poh & Anor v. Teow Ah Keow* [1996] 3 CLJ 665; [1995] 3 MLJ 89 where it was held that:

> No doubt the plaintiff's mother has been providing her services free of charge to her handicapped daughter but the courts have always compensated plaintiffs for the true value of the services that the plaintiff needs even though it is provided by a parent or other relative.

[44] The appellant's mother, during her testimony explained that she worked as a kindergarten teacher with a salary of RM1,300 per month. In her evidence, the appellant's mother also testified that she had decided to cease from pursuing her diploma in education in order to give full attention and care to the appellant. The appellant's mother also provided evidence on her and her husband's struggle and hardship in taking care of their handicapped daughter.

[45] It can be seen from the evidence of the appellant's mother that if not for the imposing necessity to take care of the appellant, she would not have ceased her study and might have possibly pursued her diploma, and hence

have a better opportunity to develop her career. Tending to the appellant is also exhausting and stressful whereby the appellant's mother had to wake up at night to attend to the appellant. We are respectfully of the view that the award of RM300 per month made by the High Court was erroneous in the circumstances and we feel that an award of RM500 per month would be a fair and reasonable amount in the circumstances of the case and in accord with other comparable cases.

Cost Of Training And Education Of Caregiver

[46] Learned counsel for the appellant stressed to us that the claim for the cost of training and education of a caregiver had been allowed in some other decided cases. According to learned counsel, the appellant's parents and carers would need to be educated and trained from time to time to provide for the appellant's needs. It was submitted that a sum of RM2,000 per year for such training and education would be reasonable.

[47] The learned trial judge however did not allow the appellant's claim for this item. The learned trial judge was of the view that there was no necessity to award such a claim and reasoned that the appellant's mother who was a kindergarten teacher would be able to guide the caregiver and would provide the best way to take care of the appellant. The Court of Appeal agreed with the reasoning of the learned trial judge and found no error on her part in dismissing this item of claim.

[48] With respect, we differ. In our considered view, the kind of training and education needed for the carers of special children such as the appellant would be very much different from the training provided for the normal kindergarten teacher. Further, we are of the view that a proper training and education is necessary to be provided to the appellant's parents and carers from time to time so as to meet the development and needs of the appellant. We therefore allow this head of claim for RM2,000 per year for 20 years, to be paid for with in a lump sum.

Cost Of The Purchase, Maintenance And Modification Of A Disabled-friendly Vehicle

[49] The appellant claimed for the cost of the purchase, maintenance and modification of a disabled-friendly vehicle at the sum of RM488,000 with replacements for every seven years over a period of 24 years (after deducting one-third for the incidental use by other family members of the appellant). The learned trial judge allowed the claim at RM89,000 as a one-off purchase for 20 years. The learned trial judge observed that the type of vehicle proposed by the appellant was of a luxurious class and the sum claimed for the purchase was excessive and unreasonable. In contrast, the learned trial judge found that there were similarities in terms of usage and functions from the vehicle proposed by the respondents to the one proposed by the appellant. Further, the learned trial judge also took into account the fact that the appellant's family was considerably small and therefore found that the respondents' proposed vehicle was more appropriate in the circumstances of the case.

[50] Learned counsel for the appellant argued that the award made by the learned trial judge was manifestly low and that no account was taken of the expense of such items as petrol, repairs, maintenance, insurance and road tax.

[51] In our considered view, the award made by the learned trial judge for a one-off purchase of the vehicle over a period of 20 years was inappropriate and unreasonable in view of the normal life span of a vehicle. We therefore allowed the claim at RM89,000 but with two purchases over a period of 20 years.

Cost Of Special Clothes, Diapers, Wipers And Creams

[52] The appellant claimed for the sum of RM500 per month for the cost of special clothes, diapers, wipers and creams. The learned trial judge however allowed the sum of RM140 per month for these items of claim. The learned trial judge was of the view that based on the available evidence, the more relevant need of the appellant would be the disposable diapers. The learned trial judge also found no evidence to support the appellant's claim on the need for special clothes and the types of cream for the use of the appellant. We found that the award of the learned trial judge was reasonable and see no justification to disturb the same.

Damages For Pain And Suffering Arising From Future Surgery

[53] The appellant claimed damages for future pain and suffering for any future surgery in the sum of RM50,000. The learned trial judge however dismissed this claim in view of the fact that the award of RM350,000 had earlier been awarded to the appellant as damages for pain and suffering. According to the learned trial judge, the sum of RM350,000 was awarded for the whole period and to include the appellant's future pain and suffering. It was contended by the appellant that damages under this item of claim had been allowed in some other cases and therefore urged the court to award the same.

[54] We found that the learned trial judge was justified in dismissing the appellant's claim for this item and as such the appeal on this award is not allowed.

Cost Of Special Food And Nutrition

[55] It was argued that the appellant would require specially prepared food and nutrition for the rest of her life and therefore the award in the sum of RM400 per month was proposed by the appellant for this claim. The learned trial judge dismissed this claim as she found that there was no evidence to support the appellant's contention that the appellant would need any special food and nutrition. The learned trial judge also reasoned that regardless of the appellant's condition, the appellant's father would surely have to provide healthy food for their family members. We affirm the learned trial judge's finding on this award.

A *Cost Of Accommodation And Living Expenses After The Appellant Attaining The Age Of 18 Years*

[56] Learned counsel for the appellant submitted that the appellant's parents are obliged in law to provide care to the appellant only until she reaches the age of 18 years. Nevertheless, after the age of 18 years, the
B appellant's parents would have to continue to provide her needs. The appellant cited several cases where similar claims had been allowed by the courts. Therefore, the appellant claimed for the sum of RM2,000 per month for future cost of accommodation and living expenses after the appellant reaching the age of 18 years.

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[57] The learned trial judge dismissed the appellant's claim, to which we agree. We found that the learned trial judge had correctly observed that the award for modification of the appellant's parents' house had already been given to cover the appellant's future need for accommodation for the rest of her life, and hence no necessity for further award to be made under this
D claim.

Cost Of Respite Care And Holidays

[58] The appellant claimed the sum of RM3,000 for each item for cost of respite care and holidays respectively. The learned trial judge dismissed the
E appellant's claim for both items of claim. With regard to the appellant's claim for the cost of respite care, the learned trial judge opined that respite care would be normally left to close family members and that the appellant had sufficiently been awarded the cost of hiring a maid to assist. The learned trial judge was also not persuaded to award the cost of holidays as she was
F of the view that going for holidays is something which is common in our society and that the appellant's family would have in any event incurred such a cost regardless of the fact of the respondents' negligence.

[59] We found no error in the assessment of the learned trial judge in this regard and have no reason to interfere with her findings.

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Conclusion

[60] For these reasons, we uphold the awards made by the learned trial judge of the High Court as regards future damage and loss, save the following three items of claim:

H (i) the cost of care by parents and family members is increased to RM120,00 (on the basis of RM500 per month for 20 years);

(ii) the cost of training and education of caregiver is allowed in the sum of RM2,000 per year for 20 years, totalling RM40,000; and

I (iii) the cost of the purchase, maintenance and modification of a disabled-friendly vehicle in the sum of RM89,000 as awarded by the learned trial judge is maintained, but with two purchases over the period of 20 years, totalling RM178,000.

[61] The question posed to us in this appeal may now be answered this way. Although it is only necessary to establish that there is a significant prospect as opposed to a mere speculative possibility that the appellant may suffer damage in the future, proof of that damage happening and the assessment of that damage is on a balance of probabilities.

[62] In the premises, we allow this appeal in part. Parties to bear their own costs.